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January 23, 2004
Via Facsimile

Ms. Janice Rawls, Chief Dep. Clerk
Re: Rule 13 Comments
100 Supreme Court Bldg.
401 Seventh Ave. North
Nashville, TN 37219-1407

Re: Comments on Proposed Changes to Supreme Court Rule 13

Dear Ms. Rawls:

Over the last 12+ years, I've worked in turns as an assistant district public defender, a solo practitioner of indigent criminal defense, and a contract appellate attorney working on behalf of the Public Defenders' Conference. I have reviewed the proposed Rule 13 changes, and based upon my years of experience in this field of law, I urge the Supreme Court not to adopt the proposed changes as written. While I agree there are abuses in the current system which must be addressed and changes which probably should be made, any such changes in either the indigent defense fund system or Rule 13 should be proposed by a committee made up of practitioners in the area of criminal defense, experts who routinely do appointed work for either defense counsel or at court request, law professors in the areas of criminal law/procedure and constitutional law, and perhaps a few trial judges who oversee criminal trials. Any and all abuses of the system would be more appropriately addressed on a case-by-case basis after an up-to-date and more thorough accounting computer system is devised and implemented for the billing side of Rule 13.

General comments:

First, I suggest that abuses by attorneys be resolved by a combination of formal ethics charges as well as an additional period of time, e.g. six months to a year, during which the attorney is banned from accepting appointed cases. The same solution would work as well for experts who are caught abusing the system. It is my understanding that the State is in the process of finding a new computer system to more accurately track indigent defense billing. I believe that this step will go a long way in curbing billing abuses, and it should be put into place before any more changes are made in the whole process.

Second, whoever wrote the proposed rule should be sanctioned for ethical violations as he or she has used incorrect and inappropriate case law in an attempt to justify the changes. See R. 3.3(a)(1), Code of Prof. Resp. As just one example , I would note specifically that under "Section

5, Subsection (A)(3)," footnote 4 of State v. Barnett, 909 S.W.2d 423 (Tenn. 1995) specifically declines to address the point for which the case is being cited in the proposed rule. If any real practicing attorney were to try this type of shenanigans in a brief to one of the appellate courts of this state, he or she would be called to answer for this deceitful behavior. Moreover, I would point out our system of funding is completely different from that of North Carolina, and therefore, North Carolina law is neither controlling nor persuasive authority. The writers of this proposed rule need to return to law school for a refresher course and should be very ashamed to present this work product as a rule for Tennessee's highest court.

Trial Judges' Decisions, Etc.

As to specific comments on how the actual process will work, although I'm perfectly aware that the AOC has already instituted this new process, I'm of the opinion that the duly-elected trial judges of this state have a duty and obligation to act like judges and do their job which includes making the actual decisions on the appointment of counsel and the provision of expert and other services for the defense. No trial judge should be permitted to shirk his or her responsibility for making these decisions. The free-wheeling, sign-anything judges should be brought to heel, and the fearful, sign-nothing judges should be properly taught and forced to make the hard choices. As a voter in Knox County, I want the trial judges here held accountable to me. While I believe a central authority should have a role in setting standardized rates for experts and things like travel or other expenses, the AOC or other centralized authority should merely administer the actual payment of the funds rather than decide who gets approved for funding.

Moreover, regardless of the Chief Justice's personal declaration, according to Ms. Clark, that he has no more of an ethical dilemma in denying or approving claims than a trial judge, I believe he is incorrect as his ethical problems in the current system arise because he represents the last stop in the criminal justice process in this state, not the first step. Clearly, the power to appoint and approve indigent defense requests should reside in the trial judges whose mistakes can be corrected at the appellate level rather than in the Chief Justice above whom there is no other state authority. It is no answer to say that Ms. Clark is a buffer to this problem since she is appointed by the Supreme Court, serves at the Court's leisure, and can have her decisions overridden by the Chief Justice. See Canon 2, Code of Judicial Conduct, section A. and commentary (the test for an appearance of impropriety is whether the conduct would create in reasonable minds a perception the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired).

Personnel Reviewing Claims:

If the Supreme Court is determined to micromanage the indigent defense funding, appropriate steps should be taken to provide competent, experienced personnel within both the

AOC and the Supreme Court to review the funding requests and claims for fees. Inexperienced non-legal personnel, no matter how well educated, should not be put in charge of reviewing funding requests under any circumstances. These same persons should not be used as "screeners" either because they simply don't have the knowledge and experience required. It is abhorrent as well as a gross waste of time for experienced criminal defense attorneys to continually be required to justify their legal decisions to a non-lawyer. The same holds true for staff lawyers who've never gotten practical experience in criminal defense by actually making a living at it. Having to continually explain legal theory and strategy over and over to these types of personnel is especially frustrating for those attorneys practicing before conscientious and competent trial judges who've already made an informed decision on the initial request. If you're going to make the criminal defense attorneys jump through more hoops, at the very least you can get personnel who have worked as criminal defense lawyers to hold the hoops.

Providing Investigators:

It is my understanding from some current trial attorneys that one of the problems arising lately is a denial of funds for investigators which the proposed rule exacerbates. I certainly recognize not every case requires funds for an investigator to assist the attorney, and I personally haven't employed one in each and every case. However, the ABA Defense Function Standard 4-4.3 clearly suggests using an investigator to assist in the defense is a requirement for providing an adequate defense since the attorney could be required to become a witness for his or her client. And as an attorney, I've been given training to interview clients, but I don't know how to do everything a licensed and trained investigator does on my cases. I don't interview people all day long; I'm not skilled in wringing the facts and truth out of witnesses like a good investigator; and I don't have the time or skill to track down witnesses who are homeless, work the streets in the projects, or who've moved. The State needs to pay me for my legal expertise as a trial or appellate attorney while paying an investigator for his or her investigative skills. It's also unfair and unreasonable to require indigent defense attorneys to do all their own investigative work when the district attorneys general do not. The DAGs have the police as well as in-house investigators to do their case investigations as well as bring the witnesses in for interviews. Indigent defense counsel do not have the luxury of those resources, and it is often the appointed investigator who uncovers evidence the prosecutor and/or police have been withholding from defense counsel in the first place.

Moreover, while it appears that some staffers at the AOC believe there is no realistic expectation that a problem could arise if an attorney interviews witnesses in a criminal case, I'm just one of many who's had to withdraw because I personally interviewed a victim who subsequently changed her story. I don't ever want to have to do it again. Another attorney here in Knoxville likely wouldn't have been able to win an acquittal for his client if he'd had to act as both attorney and investigator. In a trial here in Knox County, a witness named "Mary" whose

last name was unknown was found and interviewed by the investigator who taped the conversation. At trial this witness changed her story and denied any prior conversations with either the attorney or the investigator. Without the investigator to proffer the taped conversation at trial, the attorney would've been required to withdraw in the middle of trial to testify on behalf of Mr. Saylor, and he might not have been acquitted in the retrial. If an investigator hadn't been provided on the front end, the indigent defense fund would've been unnecessarily depleted further by the cost of a retrial. This is just one example of why people who have actually tried criminal defense cases should be the ones making the decisions on Rule 13 requests.

Further, the refusal to appoint an investigator to assist the defense attorney when such has been requested puts the attorney in an ethical bind. Such attorney is being forced to violate the ABA Standards as well as R. 3.7(a) of the Rules of Professional Conduct wherein attorneys are to decline representation in cases where the attorney is likely to become a witness. It is my understanding that AOC and Supreme Court staff personnel believe this to be an unlikely scenario for criminal defense attorneys; however, as already discussed above, it is a potential pitfall which defense attorneys ignore at the peril of ourselves and our clients.

I applaud the proposed change which requires investigators be licensed by the state in order to do appointed work. Those attorneys who abused the system by having themselves appointed as investigators in each other's cases were fools to try to work the system that way. However, Ms. Clark was wrong in her comments at the Public Defenders Annual Training Seminar that these attorneys were just trying to get around the rule prohibiting more than one attorney on the case. Being somewhat familiar with these instances in Knox County, I feel confident these attorneys were just out to make more money for themselves than any of them would as an attorney on a particular case. I don't believe this scheme had anything to do with getting more than one attorney working for the client.

Interim Billing:

The complete elimination of interim billing is an overreaction to problems facing the AOC in terms of staffing and manpower. While I understand that some people are billing on a weekly interim basis, which certainly would put strain on even the most efficient staff, monthly or even quarterly billing is a more appropriate response to the difficulties being encountered. I'm quite certain the AOC staff gets paid at least monthly, and I assume the justices do too. Why should attorneys and experts who consent to working in the indigent defense system be required to wait years for payment on their cases? At the very least, taxes for the self-employed must be paid quarterly, and I would suggest that even quarterly billing would be a less draconian means of relief for AOC personnel. Some compromise solution on interim billing should be possible without overtaxing the AOC's staffing resources.

Half-fee Travel:

The proposal to approve only half-fee amounts for travel is unfair. Such a cut fails to recognize that an attorney's or expert's rent and operating expenses remain constant in most cases regardless of whether or not the attorney or expert is out of the office. Moreover, half-fee travel pay fails to reflect any understanding that the attorney or expert cannot generate other income while he or she is out of the office working on a specific case. I've often been able to work on cases while my husband drives on lengthy trips, and I'm working just as hard in the car while he drives as I would be if I were sitting in my office. There is no reason I should be penalized for using my time efficiently. If an attorney or expert is able to dictate, read case law, or do research while mobile, there is no logical or reasonable rationale to cut the pay rate for this time especially as we now have the cyber tools to do these jobs on the road without difficulty.

Standardized expert fees and in-state experts

The procedures being used to determine how much to pay a particular expert are not working. Moreover, the AOC's insistence on a particular method of billing and the refusal to make timely payments are forcing defense counsel to seek out-of-state experts, which the Court doesn't want in the first place, because the in-state experts don't want the hassle. Here in East Tennessee, Dr. Larry Miller of ETSU was regularly used as a hand-writing and fingerprint expert until last year when he began refusing indigent casework because the AOC insisted he use its specific billing method when his regular practice is a flat fee per case which includes all time for analysis, consultations, and courtroom testimony. By trying to force Dr. Miller to bill in a manner contrary to his normal practice, the AOC has eliminated one local, convenient, and cheap expert for indigent defense appointment.

While it is a laudable goal to seek uniformity in compensation for experts across the state, it is the height of arrogance to try to force experts to change their billing methods when a flat fee option is available. The Court should provide alternatives to the fee schedule which permit those experts who charge a flat fee per case to continue to work indigent defense cases especially in-state experts. It's a simple matter to poll the in-state experts listed by the AOC and TACDL to determine a suitable flat rate if needed for a particular specialty. Polling the experts in different specialties state-wide would also be the best means to ensure an adequate pay rate for each type.

Another area of contention is the fees being paid for investigators versus mitigation specialists. In many instances, an investigator works in the role of a mitigation specialist, and there appears to be no reason to discriminate in pay depending on which role is being fulfilled. Moreover, the hourly rate for investigators is rather low, and it will likely lead to the more experienced investigators refusing to work indigent defense while the unproven and inexperienced investigators get their experience at the expense of indigent clients facing serious charges.

Perhaps, a sliding rate based on experience, which can easily be evidenced by the number of years since first licensed as an investigator or proof of cases worked, would be a more efficient yet protective means of insuring uniformity across the state. For example, the hourly rate for an investigator licensed for 1-5 years could be set at $50; the rate for one licensed 6-10 years could be set at $55; and the rate for one licensed 11+ years could be set at $60-65. This type of pay scale would recognize and encourage the efforts of more experienced investigators accepting indigent appointments, promote uniformity statewide, and still protect the rights of the indigent accused to have a competent investigator on the more serious cases. Using a sliding scale such as this would also prevent unduly penalizing the more experienced investigators who have already been working at the $65 per hour rate.

Ex Parte Hearings

Ex parte hearings should remain in place for ALL indigent funding requests, capital and non-capital alike. The district attorneys don't have to justify their funding requests in public, and they have absolutely no right to call on defense attorneys for indigent defendants to give any clue whatsoever to defense strategies or theories. (We also shouldn't have to justify them to AOC personnel once a judge has approved funding.) The DAGs don't have a right to make private defense counsel tell them who is being hired for defense and why, and they have no right to that information for an indigent defendant. It's bad enough that making a request for the expenditure of indigent defense funds has to be explained ad nauseum to AOC personnel after an ex parte hearing just to get the basic help required on appropriate cases. The DAGs may have a job to do, but it isn't their job to ride herd on indigent defense counsel or the indigent defense fund.

If, however, the Supreme Court believes ex parte hearings should not be allowed except in capital cases, the Supreme Court should put forth a rule requiring all district attorneys general to immediately institute open file policies wherein the DAGs are to give all evidence of whatever nature to defense counsel upon arraignment with a continuing duty to turn over material gathered from any source immediately. Concurrently, the DAGs should also be required by rule to ensure law enforcement personnel immediately begin sending information to counsel of record whenever the same information is forwarded to the DAGs. If the DAGs are so interested in a search for truth and openness in this system, they should have no problem turning over their files for review by defense counsel. These "open file" rules could also help prevent some of the miscarriages of justice which occur. (See e.g., the recent Knoxville News-Sentinel account of the rape suspect freed after exonerated by DNA evidence the prosecutor "misfiled.") Amazingly enough, some enlightened DAGs already follow a similar procedure which permits the criminal justice system to work more efficiently in those counties.

Stating What an Investigation Will Reveal in Motions

This portion of the proposed rule for obtaining an investigator is truly ridiculous on its face. The reason one hires an investigator is to find out what one doesn't already know. If I as defense counsel already know the State's "star" witness has told six different stories to six different people whose names and current addresses/phone numbers I possess, there might not be a need for an investigator for that particular aspect of the case. However, this is not a scenario likely to be played out in the real world, and with prosecutors routinely playing fast and loose with discovery, the chances of defense counsel finding out information relevant to the defense without the assistance of an investigator can be slim to none.

Reliance on Facsimiles in 21st Century

The proposed rule's reliance on doing things by facsimile is somewhat outdated as many law offices, including my own, no longer have that equipment. Other attorneys I know have the equipment available but must be present to turn it on or switch the phone line over to receive faxes. Such situations make communication via facsimile almost impossible for both the AOC and defense counsel.

The rules and AOC should not insist on sending approved Orders only to the attorney on a case by facsimile. In these days of scanners and the internet, sending signed and approved Orders via email should also be provided as an option. Personally, I don't have a facsimile machine and rely on the local Kinko's for one in the rare event I need it. Under the current situation, if I get an investigator or other expert appointed for a case, I have to traipse down to the Kinko's each time the AOC decides to send me an approved Order. Since the investigator/expert isn't going to start work until he or she has an approved Order in hand, I then have to forward the facsimile of the approved Order to whichever expert is waiting for it. And then the AOC probably isn't going to approve money for the time I spent forwarding the Order to my expert in the first place. The rule should require the AOC to send approved Orders directly to the expert named in it, especially if so requested in the Motion and Order, and to send it by whatever method is requested by counsel.

Conclusion

I could go on and on about the practical and ethical problems generated by Rule 13 and the proposed changes; however, I believe the point has been made that it is unworkable. These proposed changes should not be implemented, and a complete revision of Rule 13 needs to be done by a committee of professionals actually affected by and/or practicing under Rule 13. (I don't believe any such committee should have DAGs as members, however.) I appreciate the Supreme Court's willingness to extend the comment period and the opportunity to be heard.

Sincerely,

Julie A. Rice

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r13ltr.wpd

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January 23, 2004

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Nashville, TN 37219-1407

Phone No.: 615-741-2681
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A TOTAL OF NINE (9) PAGES INCLUDING COVER SHEET ARE BEING SENT

J A Rice

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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NASHVILLE

IN RE:

PROPOSED AMENDMENT TO TENNESSEE SUPREME COURT RULE 13	)	No. M2003-02181-SC-RL2-RL

AMENDED COMMENTS OF THE STATE OF TENNESSEE'S THIRTY-ONE DISTRICT ATTORNEYS GENERAL ON PROPOSED CHANGES TO SUPREME COURT RULE 13

Supplement to previous comments filed on November 14, 2003. Submitted on January 23, 2004 by and through the Office of the Executive Director, The Tennessee District Attorney General's Conference.

Introduction

The Tennessee District Attorneys General Conference (TDAGC) applauds and supports the Tennessee Supreme Court's proposed changes to Supreme Court Rule 13. TDAGC agrees with the Court that change is needed in order to avoid unnecessary expense while still providing needed services to indigent defendants.

TDAGC believes that the Rule 13 changes proposed by the Court will help improve the quality of justice, curb protracted litigation and prevent abuse. The TDAGC, in support of the Court's objectives respectfully submits additional comments and proposals that we believe would further support the Court's goal.

Rule 13 Working Group

Unfortunately, after working closely with the Rule 13 Working Group, TDAGC representatives were compelled to withdraw from that group on January 15, 2004. Initial drafts

of the Working Group's comments made clear that their intentions were to enact radical changes to Rule 13, which failed to include recommendations of the TDAGC and that were inconsistent with the Court's goals and objectives. The TDAGC, therefore, elected to submit these separate comments. The TDAGC cannot endorse the Working Group's recommendations or proposals.

Ex Parte Hearings

The TDAGC is convinced that the single largest cause of waste, abuse and runaway spending is our current ex parte procedure. TDAGC urges the Court to adopt TDAGC's proposed rules and abolish or narrowly restrict ex parte hearings. Our belief is that the Court is on firm constitutional ground in this regard, and that such action would result in the fair and reasonable granting of funds for experts and services. Open hearings would allow the trial judge to make an informed decision as to need based upon relevant information provided by each party.

TDAGC believes that it is unfair for either party in a criminal case to meet privately with the trial judge and discuss the facts of the case. Victims of crime, their families, and other interested parties quickly lose faith in the criminal justice system when attorneys representing a defendant meet secretly behind closed doors with the judge that is trying the case. Citizens in Tennessee are finding their common sense notions of fairness and justice offended by this procedure. Ex parte hearings, by their very nature, create an appearance of impropriety. In addition, the ex parte process is in conflict with statutory guarantees to victims of crime authorizing them to be present in court and to be informed of motions, hearings and reasons for continuances. The purpose of victim's rights legislation is that victims will always be notified concerning any matter that affects the case. Ex parte hearings violate these rights.

Ex parte hearings are also ripe for abuse since they allow one party to the case to present uncontested "facts". Victims of crime and prosecutors fear that even the most prudent jurist would have difficulty disregarding "facts" presented during an ex parte hearing. Faced with uncontested facts it is almost impossible for a jurist not to reach conclusions that may be erroneous and which might ultimately affect the just resolution of the case. These pitfalls are easily avoided through the process of open hearings.

The apparent premise behind ex parte hearings and current indigent spending seems to be that indigent defendants ought to be provided with the same resources available to the wealthiest of defendants. TDAGC believes that indigent defendant ought to be provided, instead, with the resources that are necessary for an adequate defense. It is true that the wealthiest defendants may possess the resources to hire exotic experts and a cadre of investigators. It is also true that the wealthiest of defendants may be able to hide their resources and surprise and ambush the State sufficiently to insure that their client, through such tactics, avoids justice. Attempts to avoid justice through such tactics and procedures should not be supported by the Court or funded by the State of Tennessee.

Records of indigent spending available through the Administrative Office of the Courts indicate, in many cases, that much more is spent on the indigent defendants than an average, or even wealthy, non-indigent defendant could ever bear. Ex parte hearings are generating delay, financial excess and concern about the fairness of proceedings. By requiring open hearings the Court honors the spirit of the justice system, avoids the appearances of impropriety and reaps the practical benefits of curbing delays and costs.

This concept is reflected in the Court's proposal to allow trial judges discretion to hold contested hearings for non-psychological experts in non-capital cases. This proposal alone would

result in a reduction of needless delays and wasted resources. [Please find attached a re-draft of Section 5 for the Court's Consideration.]

The Commission Approach

Draft comments from the Rule 13 Working Group show that the group will recommend that the Court create a commission to decide requests for experts and services - similar to North Carolina's Indigent Defense Services (IDS), created in 2001. The TDAGC respectfully urges the Court to reject authorizing such a commission.

A commission would take discretion away from the trial judge and put it in the hands of a body that would make ex parte decisions with no accountability. All aspects of a criminal trial should be under the control of the trial judge and not some distant commission. Inserting an independent administrative body into the proceedings will only create more expense and additional delay and remove all accountability.

Our research of IDS reflects that it has created greater problems than it has cured in North Carolina:

- Rather than a neutral judge, a defense attorney composed commission has given carte blanche approval to most requests for experts even recommending experts that were not requested.
- Indigent defense expert spending increased by 19% last year in North Carolina.
- Lawsuits have been filed in North Carolina claiming IDS violates attorney/client confidentiality and challenging the constitutionality of IDS.
- The roster of qualified capital defense attorneys has declined. Attorneys are traveling further distances to try cases, handling too many capital cases to be effective and creating serious scheduling problems.
- Loss of local control by the trial judge has significantly slowed case adjudication.
- Some defense attorneys claim IDS approvals are disproportionate – favoring some attorneys and excluding others.

In the end, IDS is untested. Only in existence for two years, IDS's viability and legality is still in question. Also, IDS was created to repair an indigent defense system much different from Tennessee's current system.

Call for More Capital Qualified Defense Attorneys

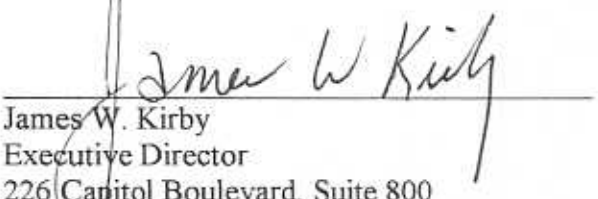
Please note that the TDAGC believes that justice is served by providing indigent defendants competent, capital case-qualified representation. The Administrative Office of the Court (AOC) should increase its recruitment efforts to increase its roster of qualified attorneys to accept appointments. Please find attached redraft of Section 3.

Conclusion

The TDAGC urges the Court to implement all its original proposals and to consider the attached redrafts of Section 3 and 5 as well as the comments filed by TDAGC on November 14, 2003 for implementation. TDAGC also requests that the Court reject the commission approach, e.g. North Carolina's IDS.

Respectfully submitted,

Tennessee District Attorneys General Conference



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Section 3. Minimum qualifications and compensation of counsel in capital cases.

(a) For purposes of this rule, a capital case is a case in which a defendant has been charged with first-degree murder and a notice of intent to seek the death penalty, as provided in Tennessee Code Annotated section 39-13-208 and Tennessee Rule of Criminal Procedure 12.3(b), has been filed and no order withdrawing the notice has been filed. Non-capital compensation rates apply to services rendered by appointed counsel after the date the notice of intent to seek the death penalty is withdrawn.

(a)(2) The court in conjunction with the appropriate bar organizations including but not limited to Tennessee Bar Association and the Tennessee Association of Criminal Defense Lawyers shall make on-going efforts to increase the number of qualified capital defense attorneys available for appointment in Tennessee, including but not limited to:

i) active recruitment efforts statewide to increase the number of qualified attorneys available to accept capital defense appointments

ii) sponsorship of capital defense training sessions that satisfy the educational requirements of this rule

iii) requiring all Public Defenders become capital defense qualified and eligible to accept capital defense appointments

(b)(1) The court shall appoint two attorneys to represent a defendant at trial in a capital case. Both attorneys appointed must be licensed in Tennessee and have significant experience in Tennessee criminal trial practice. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel." Whenever possible, a public defender shall serve as and be designated "lead

counsel."

(2) When appointing counsel to represent a defendant in a capital case, the court shall appoint a qualified attorney who has an office within the venue county. If no qualified attorney who has an office within the venue county can be appointed then the court shall appoint a qualified attorney who has an office located closest to the venue county.

(3) If the notice of intent to seek the death penalty is withdrawn at least thirty (30) days prior to trial, the trial court shall enter an order relieving one of the attorneys previously appointed. In these circumstances, the trial judge may grant the defendant, upon motion, a reasonable continuance of the trial.

(4) If the notice is withdrawn less than thirty (30) days prior to trial, the trial court may either enter an order authorizing the two attorneys previously appointed to remain on the case for the duration of the present trial, or enter an order relieving one of the attorneys previously appointed and granting the defendant, upon motion, a reasonable continuance of the trial.

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar;

(2) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases

(3) have regularly represented defendants in criminal jury trials for at least five years;

(4) have trial experience in:

(i) the use of and challenges to mental health and forensic expert witnesses;

(ii) the use of scientific and medical evidence including, but not limited to, mental health and pathology evidence;

and

(iii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;

and

(5) have completed a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(6) have at least one of the following:

(A) served as lead counsel in the jury trial of at least one capital case tried to a verdict or hung jury;

(B) served as co-counsel in the trial of at least two capital cases tried to a verdict or hung jury;

(C) served as co-counsel in the trial of a capital case tried to a verdict or hung jury and experience as lead or sole counsel in the jury trial of at least one murder case tried to a verdict or to a hung jury; or

(D) experience as lead counsel or sole counsel in at least three murder jury trials tried to a verdict or hung jury or one murder jury trial and three felony jury trials tried to a verdict or hung jury.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar;

(2) Have regularly represented criminal defendants in jury trials for at least 3 years

(3) have trial experience in:

(i) the use of and challenges to mental health and forensic expert witnesses;

(ii) the use of scientific and medical evidence Including, but not limited to, mental health and pathology evidence;

and

(iii) Investigating and presenting mitigating evidence at the penalty phase of a death penalty trial;

and

(4) have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants in capital cases

(5) have completed a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and

(6) have at least one of the following qualifications:

(A) qualify as lead counsel under (c) above; or

(B) served as sole counsel, lead counsel, or co-counsel in a murder jury tried to a verdict or hung jury

(e) Attorneys who represent the defendant in the trial court in a capital case may be designated to represent the defendant on direct appeal, provided at least one trial attorney qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, determines that appointment of new counsel is necessary to provide the defendant

with effective assistance of counsel or that the best interest of the defendant requires appointment of new counsel.

(f) If new counsel are appointed to represent the defendant on direct appeal, counsel must be members in good standing of the Tennessee Bar and maintain law offices in the state of Tennessee.

(g) Appointed counsel on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals, familiarity with the practice and procedure of the appellate courts of the jurisdiction, have demonstrated the necessary proficiency and commitment to diligently and competently represent defendants In capital cases; and they must have at least one of the following qualifications: experience as counsel of record in the appeal of a capital case; or experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as appointed appellate counsel, or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. Counsel also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts, and they must not have previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly

consent to continued representation.

(i) A prisoner who seeks relief from a conviction or sentence in a state trial or appellate court when the prisoner's execution is imminent is entitled to the representation of no more than two attorneys, at least one of whom is qualified as a post-conviction counsel as set forth in section 3(h). For purposes of this rule execution is imminent if the prisoner has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the conviction and sentence and the Tennessee Supreme Court has set an execution date.

(j) Notwithstanding the proceeding provisions, a judge may appoint a qualified lawyer to represent a defendant in a capital case pending submission of an application to the Administrative Office of the Courts and listing of that lawyer on the list of capital case qualified attorneys.

(k) An attorney who seeks to be appointed as lead counsel or co-counsel in a capital case shall submit to the Administrative Office of the Courts a notarized application on a form prescribed by the Administrative Office of the Courts and approved by the Supreme Court. The application shall require the attorney to attach proof of his or her qualifications to the application.

(l) Appointed counsel in capital cases, other than public defenders, shall be entitled to reasonable compensation as determined by the court in which such services are rendered, subject to the limitations of this rule, which limitations are declared to be reasonable. Compensation shall be limited to the two attorneys actually appointed in the case. Appointed counsel in a capital case shall submit to the Administrative Office of the Courts interim claims for compensation as approved by the court in

which such services are rendered. Interim claims shall include services rendered within the previous 180-day period. Compensation requests shall be deemed waived and shall not be paid if the request includes claims for services rendered more than 180 days prior to the date on which the claim is approved by the court in which the services were rendered.

(m) Hourly rates for appointed counsel in capital cases shall be as follows:

(1) Lead counsel out-of-court--seventy-five dollars ($75);

(2) Lead counsel in-court--one hundred dollars ($100);

(3) Co-counsel out-of-court--sixty dollars ($60);

(4) Co-counsel in-court--eighty dollars ($80);

(5) Post-conviction counsel out-of-court--sixty dollars ($60);

(6) Post-conviction counsel in-court--eighty dollars ($80);

(7) Counsel appointed pursuant to section 3(i) out-of-court--sixty dollars ($60);

(8) Counsel appointed pursuant to section 3(i) in-court--eighty dollars ($80).

(n) For purposes of this rule, "out-of-court" means time reasonably spent working on the case to which the attorney has been appointed to represent the indigent party. "In-court" means time spent before a judge on the case to which the attorney has been appointed to represent the indigent party.

(o) Absent extraordinary circumstances that warrant personal delivery, attorneys shall not be compensated for time or expenses associated with traveling to a court in another county for the sole purpose of hand-delivering or filing a document.

Section 5. Experts, investigators, and other support services.

(a) In the trial and direct appeals of all criminal cases involving indigent defendants and in the trial and direct appeals of post-conviction proceedings in capital cases involving indigent petitioners, counsel may seek investigative, expert, or other similar services.

(1) When requesting funding for expert or investigative services or other similar services in the trial and direct appeal of all criminal cases involving indigent defendants, counsel must serve a copy of the motion seeking such funding on the District Attorney General in advance of a contested hearing on the motion. At the request of counsel, the judge may hold the hearing in camera.

(2) In non-capital post-conviction proceedings, funding for investigative, expert, or other similar services shall not be authorized or approved. See Davis v. State, 912 S.W.2d 689 (Tenn. 1995).

(b)(1) Any motion seeking funding for expert or similar services shall itemize:

(A) the nature of the services requested;

(B) the name, address, and qualifications, as evidenced by a curriculum vitae or resume, of the person or entity proposed to provide the services;

(C) the means, date, time, and location at which the services are to be provided; and

(D) a statement of the itemized costs of the services, including the hourly rate, and the amount of any expected additional or incidental costs.

(2) Every effort shall be made to obtain the services of an in-state expert, or if an instate expert is not available, an expert from a contiguous state. If the person or

entity proposed to provide the service is not located in Tennessee or a contiguous state, the motion shall explain the efforts made to obtain the services of an expert in Tennessee or a contiguous state.

(3) Any motion seeking funding for investigative or other similar services shall itemize:

(A) the type of investigation to be conducted;

(B) the specific facts that suggest the investigation will result in admissible evidence;

(C) an itemized list of anticipated expenses for the investigation;

(D) the name and address of the person or entity proposed to provide the services; and

(E) a statement indicating whether the person satisfies the licensure requirement of this rule.

(4) If a motion satisfies these threshold requirements, the trial court shall conduct a hearing on the motion. The District Attorney General must be present at the hearing for a motion requesting funding for expert or investigative services.

(c)(1) Funding shall be authorized only if, after conducting a hearing on the motion, the court determines that there is a particularized need for the requested services and that the hourly rate charged for the services is reasonable in that it is comparable to rates charged for similar services.

(2) Particularized need in the context of criminal trials and appeals is established when a defendant shows by reference to the particular facts and circumstances that

the requested services relate to a matter that, considering the inculpatory evidence, is likely to be a significant issue in the defense at trial and that the requested services are necessary to protect the defendant's right to a fair trial. See Barnett, 909 S.W.2d at 423.

(3) Particularized need in the context of capital post-conviction proceedings is established when a petitioner shows by reference to the particular facts and circumstances of the petitioner's case that the services are necessary to establish a ground for post-conviction relief and that the petitioner will be unable to establish that ground for post-conviction relief by other available evidence. See Owens, 908 S.W.2d at 928.

(4) Particularized need cannot be established and funding requests should be denied where the motion contains only:

(A) undeveloped or conclusory assertions that such services would be beneficial;

(B) assertions establishing only the mere hope or suspicion that favorable evidence may be obtained;

(C) information indicating that the requested services relate to factual issues or matters within the province and understanding of the jury; or

(D) information indicating that the requested services fall within the capability and expertise of appointed counsel, such as interviewing witnesses. See, e.g., Barnett, 909 S.W.2d at 430; Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985); State v. Abraham, 451 S.E.2d 131, 149 (N.C. 1994).

(d)(1) The director and/or the chief justice shall maintain uniformity as to the rates paid individuals or entities for services provided to indigent parties. Individuals or

entities currently providing services at a rate below the maximum shall continue to be compensated at the lesser rate. Appointed counsel shall make every effort to obtain individuals or entities who are willing to provide services at an hourly rate less than the maximum. Although not an exclusive listing, compensation for individuals or entities providing the following services shall not exceed the following maximum hourly rates:

(A) Accident Reconstruction $115.00

(B) Medical Services/Doctors $250.00

(C) Psychiatrists $250.00

(D) Psychologists $125.00

(E) Investigators (Guilt/Sentencing) $50.00

(F) Mitigation Specialist $65.00

(G) DNA Expert $200.00

(H) Forensic Anthropologist $125.00

(I) Ballistics Expert $ 75.00

(J) Fingerprint Expert $ 75.00

(K) Handwriting Expert $ 75.00

(2) Time spent traveling shall be compensated at no greater than fifty percent (50%) the approved hourly rate.

(3) Investigators shall not be compensated unless licensed by the Private Investigation and Polygraph Commission of Tennessee, except when an investigator licensed in another state is authorized by a court in Tennessee to conduct an investigation in that other state.

(4) In a post-conviction capital case, a trial court shall not authorize more than $20,000 for investigative services. See Tenn. Code Ann. § 40-30-218.

(5) In a post-conviction capital case, a trial court shall not authorize more than $25,000 for the services of experts. See Tenn. Code Ann. § 40-30-218.

(6) Expert tests whose results are not admissible as evidence shall not be authorized or compensated.

(e)(1) If the requirements of sections 5(c) and (d) are satisfied and the motion is granted, the authorization shall be evidenced by a signed order of the court. Unless otherwise indicated in the order, the amount authorized includes both fees and necessary expenses under section 4(a).

(2) The order shall include a finding and the specific facts that demonstrate particularized need as well as the information required by section 5(b)(1) or (b)(2).

(3) The court may satisfy the requirements of this subsection by incorporating and attaching that portion of the defense motion that includes the specific facts supporting the finding of particularized need.

(4) Once the services are authorized by the court in which the case is pending, the order and any attachments must be submitted to the director for prior approval.

(5) If the director denies prior approval of the request, or the request exceed five thousand dollars ($5,000) per expert, or the hourly rate exceeds one hundred and fifty dollars ($150), the claim shall also be transmitted to the chief justice for disposition and prior approval.

(f) Interim billing is not permitted for services provided in non-capital cases.